No.

In the Supreme Court of the United States

FRANTZ DEPIERRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 841(b)(1)(A) of Title 21 requires the imposition of a ten-year mandatory minimum sentence upon persons who engage in a drug-related offense involving either (a) five kilograms or more of "coca leaves" or "cocaine," or (b) fifty grams (.05 kilograms) or more of those substances, or of a mixture of those substances, "which contain[] cocaine base."

The question presented is whether the term "cocaine base" encompasses every form of cocaine that is classified chemically as a base—which would mean that the ten-year mandatory minimum applies to an offense involving 50 grams or more of raw coca leaves or of the paste derived from coca leaves, but that 5000 grams of cocaine powder would be required to trigger the same ten-year minimum—or whether the term "cocaine base" is limited to "crack" cocaine.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frantz DePierre respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 599 F.3d 25. The district court's oral ruling on jury instructions and its imposition of sentence (App., *infra*, 14a & 16a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2010. This court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Title 21, U.S. Code § 841 provides in pertinent part:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> >
> > (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years * * *.

> (B) In the case of a violation of subsection (a) of this section involving—* * *
>
> (ii) 500 grams or more of a mixture or substance containing a detectable amount of—
>
> (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
>
> (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
>
> (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
>
> (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
>
> (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; * * *
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years * * *.

2. The U.S. Sentencing Guidelines Manual § 2D1.1 (2007) provides in pertinent part:

> Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy
>
> (a) Base Offense Level (Apply * * * the offense level specified in the Drug Quantity Table set forth in subsection (c) * * * .

(c) DRUG QUANTITY TABLE

* * *

*Notes to Drug Quantity Table: ***

(D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.[1]

STATEMENT

Congress in 1986 specified two grounds for imposing a ten-year mandatory minimum penalty for cocaine-related offenses. Offenses involving 5000 grams or more of "coca leaves" or "cocaine" receive a minimum ten year sentence. And the same sentence applies to offenses involving 50 grams of a substance or mixture containing "cocaine base." 21 U.S.C. § 841(b)(1)(A)(ii) & (iii).

The courts of appeals are sharply divided with respect to the meaning of the term "cocaine base" in this statute. Six circuits, including the court below, interpret the term to include any form of cocaine that satisfies the chemical definition of a "base," notwithstanding the fact that "coca leaves" and many derivatives of "cocaine" satisfy that standard and that this construction of the statute therefore renders the first prong of the mandatory minimum standard largely meaningless. For example, requiring a ten-year minimum to be imposed for offenses involving 50 grams

[1] The current Guidelines text is identical to the 2007 version applicable at petitioner's sentencing. U.S.S.G. § 2D1.1 (2009).

of coca leaves means that the portion of the statute permitting the imposition of the same sentence for an offense involving 5000 grams of coca leaves is surplusage. This interpretation of the statute also leads to the bizarre result that an offense involving 50 grams of raw coca leaves triggers the minimum ten-year sentence, but an offense involving 4990 grams of much more potent cocaine powder does not.

Five circuits have rejected the construction of Section 841 producing these absurd results, and hold instead that "cocaine base" has a narrower definition limited to "crack" cocaine and, perhaps, other smokeable cocaine compounds. The court below correctly recognized that this deep division among the courts of appeals "does need resolution by the Supreme Court." App., *infra*, 11a-12a. See also *United States* v. *Edwards*, 397 F.3d 570, 577 (7th Cir. 2005) (observing with respect to the question presented that "[a] lingering and stratified circuit split on a matter of such importance to the administration of criminal justice surely warrants the attention of Congress or resolution by the Supreme Court").

The question presented arises frequently—as demonstrated by the large number of decisions by the courts of appeals. And the question is important: the imposition of a ten-year minimum sentence in a case in which the defendant otherwise would be sentenced to less than half of that term is an issue of great significance to the hundreds if not thousands of individuals sentenced in these circumstances to mandatory minimum terms each year. The disparate treatment of similarly situated defendants based solely on the place in which they are prosecuted should not be permitted to continue. Review by this Court is plainly warranted.

A. Scientific Background

Cocaine alkaloid is a naturally-occurring substance found in coca leaves.[2] It has the molecular formula $C_{17}H_{21}NO_4$. See *United States* v. *Barbosa*, 271 F.3d 438, 462 (3d Cir. 2001). Extracting the alkaloid from the coca leaves results in a substance known as coca paste, which retains the same chemical formula. *Ibid.*

Powder cocaine is formed by dissolving coca paste in hydrochloric acid (HCl) and water (H_2O). That compound, cocaine hydrochloride, has the molecular formula $C_{17}H_{22}ClNO_4$. *Barbosa*, 271 F.3d at 462. That substance is classified chemically as a salt. "Crack" cocaine is created by mixing cocaine powder with water and sodium bicarbonate (*i.e.*, baking soda). "Freebase" cocaine results from mixing the powder with a strong alkaloid solution and an organic solvent. 1995 U.S.S.C. Report at 13-14. These solid substances both have the same chemical formula as coca paste, $C_{17}H_{21}NO_4$. *Barbosa*, 271 F.3d at 462.[3]

"The definition of a base * * * is a substance that when combined with an acid produces a salt." *United States* v. *Booker*, 70 F.3d 488, 490 n.6 (7th Cir. 1995). Any substance with the molecular formula of $C_{17}H_{21}NO_4$—a category that includes cocaine alkalo-

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[2] U.S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy at 7 (1995), available at http://www.ussc.gov/crack/exec.htm [hereinafter 1995 U.S.S.C. Report].

[3] It is possible to combine coca paste with other acids, such as sulfuric acid (H_2SO_4), to create different cocaine salts, but cocaine hydrochloride appears to be by far the most common form in the United States. See *Barbosa*, 271 F.3d at 462; 1995 U.S.S.C. Report at 10.

id in coca leaves, coca paste, non-powder cocaine, freebase cocaine, and crack cocaine—is classified chemically as a base.

Cocaine powder can be ingested or snorted, leading to absorption through the nasal passageway, or dissolved in water and injected. *Barbosa*, 271 F.3d at 462. It cannot, however, be smoked, because the higher temperatures required to vaporize cocaine hydrochloride decompose the cocaine molecule. 1995 U.S.S.C. Report at 12-13. Freebase and crack cocaine can be smoked, allowing absorption through the lungs. *Id.* at 14-15.

B. Statutory Background

The Anti-Drug Abuse Act ("ADAA"), Pub. L. No. 99-570, 100 Stat. 3207, enacted in 1986, creates the framework for punishing drug-related offenses. The quantity and type of drugs involved in an offense trigger specified mandatory minimum sentences.

The statute provides a mandatory minimum 10-year sentence for cocaine-related offenses involving:

- "5 kilograms or more of a mixture or substance containing a detectable amount" of "coca leaves" or "cocaine"; or
- "50 grams or more of a mixture or substance" containing coca leaves or cocaine that "contains cocaine base."

21 U.S.C. § 841(b)(1)(A)(ii) & (iii). A five-year mandatory minimum applies to offenses involving 500 grams or more of mixtures containing coca leaves or cocaine, and those involving 5 grams or more of such mixtures that contain cocaine base. *Id.* § 841(b)(1)(B)(ii) & (iii). The statute does not define the terms "cocaine" or "cocaine base."

The legislative history of the ADAA indicates that Congress enacted the statute to address the then-widespread use of crack cocaine by imposing penalties targeting that form of the drug. As Senator Chiles stated:

> [T]itle I addresses the widespread emergence of crack cocaine in this country. As one who has introduced several bills addressing this lethal drug, I am very pleased that the Senate bill recognizes crack as a distinct and separate drug from cocaine hydrochloride with specified amounts of 5 grams and 50 grams for enhanced penalties. The bill also recognizes crack's insidious impacts on neighborhoods by outlawing crack houses and doubling penalties for those who manufacture drugs within 1,000 feet of our schools.

132 Cong. Rec. S14270-01, 1986 WL 785375 (Sept. 30, 1986); see also *"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs,* 99th Cong., 2d Sess. 1 (1986) (discussing the "frightening and dangerous new twist in the drug abuse problem—the growing availability and use of a cheap, highly addictive, and deadly form of cocaine known on the streets as 'crack'") (statement of Sen. Roth); *United States* v. *Perry*, 389 F. Supp. 2d 278, 288-289 & n.11 (D.R.I. 2005) (discussing legislative history).

Following enactment of the statute, the United States Sentencing Commission revised its guidelines to accord with the ADAA's mandatory minimum prescriptions. See *United States* v. *Shaw*, 936 F.2d 412, 415 (9th Cir. 1991).

Interpreting both the statute and the sentencing guidelines, the courts of appeals reached conflicting conclusions regarding the meaning of the term "cocaine base." Some courts held the term limited to crack cocaine, while others interpreted it to include all chemically basic forms of cocaine, including coca leaves and coca paste as well as crack and freebase cocaine. Compare *United States* v. *Rodriguez*, 980 F.2d 1375, 1378 (11th Cir. 1992) (holding that "cocaine base" is not limited to crack but includes all forms of cocaine base according to the scientific meaning of the term); *United States* v. *Jackson*, 968 F.2d 158, 163 (2d Cir. 1992) (same); with *Shaw*, 936 F.2d at 416 (holding that "cocaine base" means "crack").

The Sentencing Commission responded to these decisions by submitting to Congress in 1993 a report containing an amendment to the Guidelines defining "cocaine base" as limited to "crack cocaine." U.S.S.G. § 2D1.1(c) (Notes to Drug Quantity Table). The amendment added a note to the Guidelines' Drug Quantity Table stating that "'[c]ocaine base,' for the purposes of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." See *United States* v. *Montoya*, 87 F.3d 621, 623 (2d Cir. 1996) (quoting Sentencing Guidelines § 2D1.1(c) (eff. Nov. 1, 1993)).

The Commission made clear that, "[u]nder this amendment, forms of cocaine base other than crack (e.g., coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride, scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine [hydrochloride]."

Montoya, 98 F.3d at 623 (quoting Sentencing Guidelines App. C, Amend. 487 (eff. Nov. 1, 1993)). After the prescribed period of Congressional review, 28 U.S.C. § 994(p), the amendment went into effect.

The sentencing guidelines amendment did not eliminate the conflict among the courts of appeals with respect to the proper interpretation of Section 841(b)'s text imposing higher mandatory minimum sentences for offenses involving "cocaine base." That conflict, which has persisted and deepened following the revision of the sentencing guidelines, is the subject of the question presented in this petition.

C. Proceedings Below

1. Petitioner was charged with distributing 50 grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1), and the government sought a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(iii).

The government argued to the district court that the jury was required to find only that petitioner distributed "cocaine base, not that it was the particular form of cocaine base known as crack cocaine." Tr. 443.[4] Petitioner requested that the jury be instructed that it was obligated to find that petitioner's offense involved "not just cocaine base, but the form known as crack cocaine." Tr. 512. The district court ruled that "the question is cocaine base; that is, the non-hydrochloride form of cocaine, which may or may not manifest itself in something that's been identified as crack cocaine." App. *infra*, 13a.

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[4] "Tr." refers to the trial transcript.

The court's instructions directed the jury to determine whether the controlled substance was "cocaine base," pointing out that there had been testimony about "crack cocaine" but that "the statute that's relevant asks about cocaine base. Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base." Tr. 585; see also Tr. at 595 (reemphasizing government's burden to prove "that what was involved was cocaine base"). The verdict form likewise required the jury to find only that petitioner possessed cocaine base. App., *infra*, 16a-17a.[5]

Following petitioner's conviction, the district court sentenced him to ten years in prison—the minimum sentence possible given the court's determination that "cocaine base" in Section 841 means all chemically basic forms of cocaine—because the court believed that it was compelled to impose that sentence. The district judge stated:

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[5] Moreover, the evidence would not have supported a finding that petitioner's offense involved crack cocaine. The government's expert witness was "not able to identify baking soda in th[e] sample" (Tr. 499)—and baking soda would have been present if the substance had been crack cocaine (see page 6, *supra*).

The court of appeals erred in suggesting that "some evidence indicates the substance here was crack." App., *infra*, 10a. The district court did "repeatedly refer[] to [the substance] as crack" at sentencing (see *ibid.*), but that was because after the district court's jury instruction the parties used the term "cocaine base" and "crack cocaine" interchangeably. See Aid in Sentencing Memo. at 1, *United States* v. *DePierre*, 1:06-CR-10058-DPW-1 (D. Mass. Aug. 6, 2008) (Dkt. #56) ("Mr. Depierre was convicted of possessing a firearm with an obliterated serial number, distribution cocaine, and distributing over 50 grams of cocaine base ('crack cocaine').").

> I also say, as I must in these circumstances, I think this is far too harsh a sentence for you and if I had my choices, my choices would have been closer to the recommendation [of 41-51 months] that [petitioner's counsel] made than it is to that which the government made, but I don't have the choices here. So, under these circumstances, I've given you the lowest sentence in terms of incarceration that I can * * *.

App., *infra*, 15a.[6]

2. The court of appeals affirmed, rejecting petitioner's contention that the term "cocaine base" in Section 841(b)(1)(A)(iii)—the provision requiring the ten-year mandatory minimum sentence—should be construed to encompass only crack cocaine and not other forms of cocaine categorized chemically as a base.

The court stated while crack was "admittedly" the main focus of Congress's concern in passing the Act, prior First Circuit precedent held that "cocaine base" in Section 841(b)(1)(A)(iii) "refers to 'all forms of cocaine base, including but not limited to crack cocaine.'" App., *infra*, 10a (quoting *United States* v. *Anderson*, 452 F.3d 66, 86-87 (1st Cir. 2006)).

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[6] Petitioner also was convicted of distributing cocaine in powder form, in violation of 21 U.S.C. § 841(a)(1); and he pleaded guilty to possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). Judgment in a Criminal Case at 1, *United States* v. *DePierre*, 1:06-CR-10058-DPW-1 (D. Mass. Aug. 8, 2008) (Dkt. #59). Neither of those convictions carried a mandatory minimum sentence. See 21 U.S.C. § 841(a)(1); 18 U.S.C. § 924(a)(1)(B).

The court below observed that other courts of appeals had adopted conflicting interpretations of the statute, and stated that "[b]ecause of the circuit split this issue does need resolution by the Supreme Court." App., *infra*, 11a-12a.

REASONS FOR GRANTING THE PETITION

The clear and unresolved circuit split over the definition of "cocaine base" demands this Court's intervention. At present, roughly half of the courts of appeals punish those individuals found with chemically basic forms of cocaine other than crack with the mandatory minimums that the other half of the circuit courts reserve only for cases in which the government proves possession of crack cocaine. That clear conflict on an important question that arises with considerable frequency necessitates this Court's intervention.

Moreover, the interpretation of the statute adopted by the court below violates three well-settled canons of statutory construction: the principle that a statute should not be interpreted in a manner that renders some of its provisions surplusage, the rule that statutes should not be interpreted to produce absurd results, and the rule of lenity. The alternative interpretation is consistent with the relevant plain language and produces none of these impermissible results. The petition for a writ of certiorari should be granted.

A. There Is A Deep, Well-Established Conflict Among The Courts Of Appeals Regarding The Question Presented.

The eleven courts of appeals that have addressed the meaning of "cocaine base" in 21 U.S.C. § 841(b) are sharply divided with respect to the proper inter-

pretation of that term. The First, Second, Third, Fourth, Fifth, and Tenth Circuits hold that "cocaine base" includes all chemically basic forms of cocaine. Those decisions squarely conflict with the determinations of the Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits, holding that "cocaine base" encompasses only "crack cocaine" (or, in the case of the D.C. Circuit, potentially any smokeable form of cocaine).[7]

The courts of appeals have repeatedly recognized the persistent conflict and urged this Court to address the issue. The Seventh Circuit stated that "[a] lingering and stratified circuit split on a matter of such importance to the administration of criminal justice surely warrants the attention of Congress or resolution by the Supreme Court." *United States* v. *Edwards*, 397 F.3d 570, 577 (7th Cir. 2005). The court below expressed the same view: "[b]ecause of the circuit split this issue does need resolution by the Supreme Court * * *." App., *infra*, 11a.

1. The Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits have interpreted "cocaine base" to mean only crack and, perhaps, other smokeable types of cocaine base.

Five courts of appeals have given "cocaine base" a narrow definition. Four courts have held that it includes only crack cocaine. See *United States* v. *Hig-*

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[7] Although the Eighth Circuit has, in some cases, equated "cocaine base" with "crack," see *United States* v. *Vesey*, 330 F.3d 1070 (8th Cir. 2003), its subsequent decisions reserving the issue indicate that the court has not yet resolved the issue definitively. See, *e.g.*, *United States* v. *Williams*, 557 F.3d 556, 562 (8th Cir. 2009). See also *United States* v. *Higgins*, 557 F.3d 381, 395 & n.3 (6th Cir.), cert. denied, 130 S. Ct. 817 (2009).

gins, 557 F.3d 381, 394 (6th Cir.), cert. denied, 130 S. Ct. 817 (2009); *United States* v. *Edwards*, 397 F.3d 570, 577 (7th Cir. 2005); *United States* v. *Booker*, 70 F.3d 488, 490 (7th Cir. 1995); *United States* v. *Hollis*, 490 F.3d 1149, 1156 (9th Cir. 2007); *United States* v. *Munoz-Realpe*, 21 F.3d 375 (11th Cir. 1994).

Thus, the Sixth Circuit holds that "the term 'cocaine base' as used in § 841 means 'crack cocaine.' * * * [B]efore the enhanced penalties of § 841 can apply, the indictment must charge and the jury must find beyond a reasonable doubt that the defendant committed a crime involving crack cocaine." *Higgins*, 557 F.3d at 395-96. See also *Booker*, 70 F.3d at 494 ("[I]t is clear that Congress intended the enhanced penalties to apply to crack cocaine and the lesser penalties to apply to all other forms of cocaine."); *Hollis*, 490 F.3d at 1156 ("We read the statute, therefore, as requiring the indictment to charge and the jury to find 'crack' to trigger the enhanced penalties associated with cocaine base."); *Munoz-Realpe*, 21 F.3d at 377 (rejecting the government's challenge to a definition of "cocaine base" as "crack").

The D.C. Circuit has similarly refused to interpret "cocaine base" to include all forms of cocaine taking a basic, rather than salt, form:

> [A chemical] approach to interpreting "cocaine base" would be problematic. Congress could hardly have intended to apply the enhanced penalties to forms of cocaine base that are not smokable or even consumable without further processing [*i.e.*, coca leaves], while imposing the lesser penalties on defendants dealing in similar amounts of ready-to-snort cocaine hydrochloride.

United States v. *Brisbane*, 367 F.3d 910, 913 (D.C. Cir. 2004).

That court considered two possible definitions of "cocaine base"—either all smokeable forms of cocaine or crack cocaine. It did not reach a final conclusion on the issue, however, as the government had proven neither possession of smokeable cocaine nor possession of crack. *Brisbane,* 367 F.3d at 914.

2. The First, Second, Third, Fourth, Fifth, and Tenth Circuits have held that "cocaine base" includes any form of cocaine qualifying chemically as a base.

Six courts of appeals have adopted a conflicting interpretation of the statute, construing "cocaine base" to mean all chemically basic forms of cocaine.

The Third Circuit holds that "'cocaine base' encompasses all forms of cocaine base with the same chemical formula when the mandatory minimum sentences under 21 U.S.C. § 841(b)(1) are implicated." *United States* v. *Barbosa*, 271 F.3d 438, 467 (3d Cir. 2001).

The five other courts of appeals have reached the same conclusion. See *United States* v. *Anderson*, 452 F.3d 66, 86-87 (1st Cir. 2006) ("[A]lthough § 841(b)(1) does not define 'cocaine base,' * * * that the term, as used in the statute, includes all forms of cocaine base, including but not limited to crack cocaine.") (quoting *United States* v. *Lopez-Gil*, 965 F.2d 1124, 1134 (1st Cir. 1992)); *United States* v. *Jackson*, 968 F.2d 158, 162 (2d Cir. 1992) ("We decline to equate cocaine base with 'crack' cocaine."); *United States* v. *Ramos*, 462 F.3d 329, 333-34 (4th Cir. 2006) (agreeing with the Second Circuit in *Jackson* and finding no error in jury instructions that did not require a

specific finding that the offense involved crack cocaine); *United States* v. *Butler*, 988 F.2d 537, 543 (5th Cir. 1993) ("Although a substance does not appear to be crack cocaine, it may nevertheless be cocaine base within the meaning of § 841(b)."); *United States* v. *Easter*, 981 F.2d 1549, 1558 n.7 (10th Cir. 1992) (holding that the plain language of statute controls in absence of congressional intent to limit cocaine base to crack cocaine).

* * * * *

If petitioner had been tried in Chicago, Atlanta, the District of Columbia, Los Angeles, Detroit, or San Francisco, he would not have been subject to the ten-year mandatory minimum sentence imposed in this case. It is only because he was prosecuted in Boston that the mandatory minimum applied. And persons in the same situation charged in New York, Philadelphia, Baltimore, Houston, and numerous other cities would also be subject to a ten-year minimum sentence. That grossly disparate treatment of similarly-situated individuals is intolerable, and review by this Court of the question presented is therefore plainly warranted.

B. The Question Presented Is Important—Because Of Its Significant Impact On The Applicability Of The Ten-Year Mandatory Minimum Sentence—And Arises With Great Frequency.

Whether "cocaine base" means only crack cocaine or instead includes all chemically basic forms of cocaine has a very substantial effect on the sentences imposed upon defendants convicted of offenses involving cocaine. Under the approach applied below and in five other circuits, the ten-year minimum ap-

plies to offenses involving only 50 grams of coca leaves or coca paste. In the five circuits adopting the narrower construction of the statute, the statutory minimum sentence for a first such offense would be one year. 21 U.S.C. § 844.

The considerable additional jail time resulting from the broad interpretation of "cocaine base" applied by the court below and other courts of appeals has a very significant real-world effect, especially when sentences may be imposed consecutively. "To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake." *Barber* v. *Thomas*, No. 09-5201, at *18 (U.S. June 7, 2010) (Kennedy, J., dissenting).

This interpretation of the statute also confers a tremendous amount of leverage on the government. Simply by choosing to include a charge under the mandatory minimum provision, the government may transform a case involving 50 grams of coca leaves or coca paste from a routine drug offense into one carrying a ten-year minimum, because those substances qualify as "cocaine base." This charging option therefore enables the government to exert tremendous pressure on potential defendants. In the circuits applying a narrow definition of "cocaine base," by contrast, the government is deprived of that leverage.

The issue is not only important, but it also recurs with great frequency. The number of decisions from the courts of appeals addressing the issue demonstrates that fact.

And it is confirmed by Sentencing Commission statistics indicating that in fiscal year 2009 alone, 4613 individuals received mandatory minimum sen-

tences based on offenses involving "powder cocaine," and 4566 individuals received such sentences based on "crack cocaine."[8] Because these are the only two categories of sentencing data for cocaine-related offenses, it appears quite likely that the "crack cocaine" category actually reflects all mandatory minimum sentences based on the "cocaine base" prong of Section 841(b)—and therefore includes a significant number of sentences imposed for offenses involving cocaine-related substances *other than* crack cocaine.[9] Discounting that number for offenses actually involving crack cocaine, it remains clear that the question presented here involves a significant number of individuals every year.

Indeed, commentators have noted the importance of the question presented and the need for clarification by this Court. See, *e.g.*, Andrew King, Comment, *The Meaning of the Term "Cocaine Base" in 21 U.S.C. § 841(B)(1): A Circuit Split Over Statutory Interpretation*, 48 Duq. L. Rev. 105, 121-22 (2010) ("The Supreme Court can intercede and adopt an interpretation that will apply to all the circuits, removing the disparity that this circuit split has created. * * * [I]t is clear this issue is ripe for intervention."); Andrew C. MacNally, Note, *A Functionalist Approach to the Definition of "Cocaine Base" in § 841*, 74 U. Chi. L. Rev. 711, 744 (2007) (a uniform definition will "pro-

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[8] United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Fiscal Year 2009, Table 43, available at http://www.ussc.gov/ANNRPT/2009/Table43.pdf.

[9] The Sentencing Commission's explanation of its data indicates that it is based on information "obtained from the presentence report and represents the assessment of the probation officer." *Id.* Appendix A at 8, available at http://www.ussc.gov/ANNRPT/2009/appendix_A.pdf.

vide[] a solution to a circuit split that has lingered for over a decade"); Spencer A. Stone, Note, *Federal Drug Sentencing—What Was Congress Smoking? The Uncertain Distinction Between "Cocaine" and "Cocaine Base" in the Anti-Drug Abuse Act of 1986*, 30 W. New Eng. L. Rev. 297, 349 (2007) ("[T]he split among the federal circuits should be resolved."); Amanda D. Cary, Comment, *Cocaine Base: Not All It's Cracked Up To Be*, 40 U.C. Dav. L. Rev. 531, 535 (2006) ("This Comment concludes by advocating that the Supreme Court adopt a uniform definition of 'cocaine base' * * *.").

The United States has not sought review of court of appeals decisions limiting "cocaine base" to crack—for example in *Edwards*, 397 F.3d 570 (7th Cir. 2005), or *Brisbane*, 367 F.3d 910 (D.C. Cir. 2004). The only way for the Court to resolve the deep and persisting conflict regarding this important issue, therefore, is to grant a petition filed by a defendant, such as petitioner here.[10]

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[10] The Court previously has denied defendants' petitions touching upon this issue for reasons that do not apply here. In *Higgins*, for example, the defendant sought review not of the correctness of the Sixth Circuit's holding that the "cocaine base" encompassed only crack cocaine (which, of course, favored the defendant), but rather of the court of appeals' separate determination that the jury had found that the defendant possessed the requisite amount of crack cocaine. See 557 F.3d at 396 ("Given the fact that the indictment clearly defines 'cocaine base' as 'crack cocaine' and that the verdict form references the indictment, we conclude that the jury found beyond a reasonable doubt that Higgins possessed crack cocaine.") (footnote omitted).

In *Hollis* and *Ramos*, the defendant sought review of the court of appeals' harmless error determinations. See *Hollis*, 490 F.3d at 1157 ("While an *Apprendi* error occurred in this case, it

The question presented has percolated through all of the court of appeals but one, and the conflict is persistent and deep. To eliminate this disagreement among the lower courts and ensure equal treatment of defendants across the Nation with respect to this important issue, the Court should grant review. As the court below stated, "[b]ecause of the circuit split

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was harmless beyond a reasonable doubt. There was overwhelming and uncontradicted evidence at trial that the substance Hollis distributed was crack."); *Ramos*, 462 F.3d at 333 ("Because there was no objection to the jury charge and to the form of the special verdict [containing references only to cocaine base], for Ramos to succeed in his argument there must have been plain error on the part of the district court.").

And in *United States* v. *Robinson*, 462 F.3d 824 (8th Cir. 2006), the court of appeals did not address the question presented here, observing that the defendant had "admitted during the plea colloquy that his offenses involved 'distribution of cocaine base, that would be crack,'" and that therefore "even if the harsher minimum sentence mandated by 21 U.S.C. § 841(b)(1)(A) for 'cocaine base' offenses is limited to a conviction for distributing the crack form of cocaine base (an issue we need not decide), there was no plain error in sentencing Robinson to that minimum sentence." 462 F.3d at 826.

Finally, the court of appeals in *Anderson* observed that the district court had correctly found that that the defendant "was responsible for the distribution of 6.1 grams of crack cocaine" and relied on that fact in rejecting the defendant's challenge to the imposition of the mandatory minimum sentence, stating that because "the district court found that [the defendant] was found guilty of distributing 6.1 grams of crack cocaine, it is clear that [the defendant] was properly sentenced under the 'cocaine base' provision." 452 F.3d at 85, 87.

Here, by contrast, petitioner has squarely presented the issue to the Court; petitioner's counsel objected to the district court's ruling that "cocaine base" is not limited to crack cocaine; and the evidence does not support a conclusion that petitioner possessed crack cocaine.

this issue does need resolution by the Supreme Court." App., *infra*, 11a-12a.

C. The Statutory Term "Cocaine Base" Encompasses Only Crack Cocaine.

The relevant principles of statutory interpretation all point to the same conclusion: "cocaine base" should be construed to include only crack cocaine.

1. Interpreting "cocaine base" to encompass all cocaine variants that qualify as a base in chemical terms renders parts of the statute meaningless and leads to absurd results.

a. This Court has long recognized its "duty to give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotations omitted); see also *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112 (1991) ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."). Giving "cocaine base" the broad meaning accorded by the court below renders other parts of Section 841(b)(1) meaningless, and therefore violates this principle.

Congress in this provision specified two standards for imposing a ten-year mandatory minimum sentences in cocaine-related offenses: first, if the offense involved "5 kilograms or more of a mixture or substance containing a detectable amount" of "coca leaves" or "cocaine"; second, if it involved "50 grams or more of a mixture or substance" containing coca leaves or cocaine that "contains cocaine base." 21 U.S.C. § 841(b)(1)(A)(ii) & (iii).

"To a scientist, 'cocaine' and 'cocaine base' are synonymous; they both refer to a substance with the formula $C_{17}H_{21}NO_4$." *Booker,* 70 F.3d at 490. And coca leaves contain the same substance. See page 6, *supra*.

Construing "cocaine base" to mean any substance classified chemically as a base therefore renders Congress's first standard for imposing mandatory minimum sentences largely meaningless.

For example, under such a construction, a person possessing 50 grams of coca leaves would be subject to a mandatory minimum of ten years, even though Congress made clear that it intended to place coca leaves in the more lenient sentencing group by dedicating an entire separate provision of the statute—Section 841(b)(1)(A)(ii)(I)—to coca leaves and requiring 5000 grams of coca leaves to trigger the ten-year mandatory minimum.

Applying the broad chemical definition of "base" not only leads to a result contrary to Congress's intent as expressed in the structure of the statute, but it also renders Section 841(b)(1)(A)(ii)(I) superfluous. Because the ten-year minimum would be applied to an offense involving 50 grams of coca leaves based on the "cocaine base" provision, Section 841(b)(1)(A)(iii), there would never be an occasion to apply the specific coca leaf provision.

The same is true of numerous other cocaine-related compounds other than crack cocaine. The statutory term "cocaine" (in Section 841(b)(1)(A)(ii)(II)) also describe substances with the same active ingredient ($C_{17}H_{21}NO_4$) as "cocaine base" (in Section 841(b)(1)(A)(iii)). The statute thus applies the ten-year mandatory minimum to two different thre-

shold quantities of the same underlying chemical substance, rendering meaningless the statutory provision requiring a larger quantity to trigger the mandatory minimum. See *Edwards*, 397 F.3d at 574 (noting "the probable ambiguity if the statutory text alone were considered, given that the same penalty applie[s] to 5 kilograms of 'cocaine,' § 841(b)(1)(A)(ii), as 50 grams of 'cocaine base,' § 841(b)(1)(A)(iii), although the two are chemically the same").

b. One of the few cocaine-related substances for which the broad construction of "cocaine base" does not render the first part of Section 841(b)(1)(A) meaningless is cocaine powder.

But the broad construction produces the illogical result that offenses involving coca leaves and coca paste are punished more harshly than those involving cocaine powder, even though cocaine powder is more potent and more easily consumed than coca leaves. See 1995 U.S.S.C. Report at 16-17 ("Ingesting coca leaves generally is an inefficient means of administering cocaine. * * * Cocaine snorted through the nasal passages appears in the blood three to five minutes after administration, significantly faster than the 30 minutes required for it to reach the bloodstream through ingestion.").

As the D.C. Circuit concluded, "Congress could hardly have intended to apply the enhanced penalties to forms of cocaine base that are not smokable or even consumable without further processing [*i.e.*, coca leaves], while imposing the lesser penalties on defendants dealing in similar amounts of ready-to-snort cocaine hydrochloride." *Brisbane*, 367 F.3d at 913.

"[I]t is a venerable principle that a law will not be interpreted to produce absurd results." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part); see also, *e.g.*, *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504 (1989). Because broadly construing "cocaine base" produces this absurd consequence, that approach should be rejected by this Court.

2. Limiting "cocaine base" to crack cocaine is consistent with the provision's plain language.

Interpreting "cocaine base" to mean a specific type of cocaine is not just consistent with the statutory structure and with the principle that congressional enactments should be construed so as to avoid absurd results; it is also consistent with the language Congress used in drafting the provision.

When Congress enacted the ADAA in 1986, "crack" cocaine was a relatively recent phenomenon, and that term was considered slang usage. See *Shaw*, 936 F.2d at 415-16. Indeed, the House Committee on the Judiciary issued a report in 1986 urging passage of a resolution calling for a conference on drug abuse. That report explained:

> In the summer of 1986, the wave of the cocaine abuse epidemic which had been growing for a decade began to crash upon American cities in the form of "crack." Crack, the street name for cocaine freebase, a preparation of cocaine hydrochloride and sodium bicarbonate, can be smoked and consequently produces intense moments of the cocaine "rush."

Id. (quoting H.R. Rep. No. 99-846, 99th Cong., 2d Sess. 4 (1986)).

Given this context, the term "cocaine base" is most logically construed to refer to the types of smokeable cocaine used for the "freebasing" that was the focus of Congress's concern. At the minimum, the term is ambiguous and, in view of the consequences of applying the broader, chemical construction of the term—in particular the disruption of Congress's scheme, rendering meaningless other provisions of the same statute, as well as the absurd results—the narrower meaning should be adopted by this Court.

3. The legislative history demonstrates that Congress intended to single out crack cocaine for harsher punishment.

The court below recognized that crack cocaine was the "main focus of Congress's concern" in passing the ADAA. App., *infra*, 10a. Indeed,

> [i]n 1986, Congress was concerned about the emergence of a new, smokable form of cocaine that was more dangerous than powder cocaine, less expensive, and highly addictive. * * * [I]t is clear that Congress intended the enhanced penalties to apply to crack cocaine and the lesser penalties to apply to all other forms of cocaine.

Booker, 70 F.3d at 493-94. "[W]hen Congress adopted the [ADAA], it meant to deal with what it saw as a crack epidemic sweeping the country." *Hollis*, 490 F.3d at 1156; see also *Higgins*, 557 F.3d at 395 ("[I]t is clear that Congress intended that the enhanced penalties for 'cocaine base' would apply to crimes in-

volving 'crack cocaine.'"); page 8, *supra* (discussing legislative history).

The court in *Edwards* correctly concluded after "[c]anvassing the legislative history" that "it is clear that Congress intended the enhanced penalties to apply to crack cocaine and the lesser penalties to apply to all other forms of cocaine." 397 F.3d at 574 (internal quotations omitted).

4. The rule of lenity supports interpreting "cocaine base" to encompass only crack cocaine.

When interpreting a criminal statute, "where text, structure, and history fail to establish that the Government's position is unambiguously correct[,]" the rule of lenity requires that the ambiguity be resolved in the defendant's favor. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). This rule applies to statutes defining criminal penalties as well as to statutes defining criminal offenses: "'the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.'" *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (quoting *Ladner* v. *United States,* 358 U.S. 169, 178 (1958)).

Here, where the meaning of "cocaine base" is ambiguous at best, and there is no clear indication that Congress intended the mandatory minimum sentences to be triggered by lesser amounts of cocaine other than crack cocaine, the rule of lenity mandates adoption of the narrower construction of the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2010

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 08-2101

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANTZ DEPIERRE,
Defendant-Appellant.

Appeal from the United States District Court for the District of Massachusetts. No. 1:06-cr-10058-DPW-1 – **Douglas P. Woodlock**, *Judge.*

ARGUED FEBRUARY 4, 2010 – DECIDED MARCH 17, 2010

Before LYNCH, BOUDIN, and HOWARD, *Circuit Judges.*

BOUDIN, Circuit Judge.

After selling drugs on two occasions to a government informant, Frantz DePierre was tried and convicted of distributing cocaine in powder form (in the first sale), 21 U.S.C. § 841(a)(1) (2006), and of distributing 50 grams or more of cocaine base (in the second), *id.*, which carries a ten-year minimum sentence, *id.* § 841(b)(1)(A)(iii). In reviewing DePierre's appeal, we begin with a brief overview of events, add-

ing details in the discussion of individual claims of error.

In January 2005, a confidential informant ("CI") working with government agents received a call from DePierre. According to the CI's later trial testimony, DePierre offered to sell the CI crack cocaine. The CI, himself a former drug dealer, had been working with agents to investigate firearm and drug sales in the Haitian community in and around Boston, and the CI and DePierre had had earlier contacts. In a follow-up recorded phone call by the CI, primarily concerning proposed gun purchases, DePierre confirmed that he had the "cookies," a reference to crack according to the CI.[1]

The two men then agreed on a purchase by the CI of a quantity of powder cocaine, although DePierre confirmed that he could "[c]hef [it] up," meaning to cook the powder into crack. *See United States v. Santiago*, 566 F.3d 65, 68 (1st Cir. 2009) (noting the meaning of "chef it up"). In early February 2005, the powder sale was completed, but the federal agents decided to invite a transaction involving crack, and further discussions between the CI and DePierre ensued, with the CI pressing for crack rather than powder and DePierre confirming that he could provide crack. In March, DePierre sold the CI 55.1 grams of crack.

Following indictment, DePierre pled to one firearms charge, three other firearms charges were dis-

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[1] *See generally* Office of National Drug Control Policy, Street Terms: Drugs and the Drug Trade, Crack Cocaine, http://www.whitehousedrugpolicy.gov/streetterms/ByType.asp?intTypeID=2 (last visited February 25, 2010) (listing "cookies" as a slang term for crack cocaine).

missed, and trial followed solely on the two drug charges. Without denying the two sales, DePierre urged he had been entrapped, principally as to the sale of cocaine base. The entrapment defense was submitted to the jury, which after a four-day trial rejected the defense and convicted DePierre on both charges. The judge sentenced DePierre to ten years in prison, the statutory minimum for a sale of 50 or more grams of cocaine base. DePierre now contests only the cocaine base conviction and the ultimate sentence, albeit on several different grounds.

DePierre's main contention on appeal relates to the distinction between crack and cocaine base, critical at sentencing, but we start with DePierre's conviction. Here, he claims that the judge misinstructed the jury on his substantive entrapment defense and, relatedly, that the judge erred at sentencing in rejecting DePierre's counterpart claim that the government engaged in sentencing factor manipulation. Both arguments rest on the premise that DePierre sought only to sell powder cocaine but was wrongfully induced to sell crack.

Although DePierre does not say that the evidence compelled the jury to accept the defense, a description of the evidence on both sides provides context for the misinstruction claim. DePierre had in his favor the facts that he initially delivered powder cocaine and that further contacts had to be made by the CI before crack was procured. One of the government agents testified candidly that he sent the CI back to renew his efforts precisely in order to see whether DePierre could be drawn into a sale of crack, carrying with it the prospect of a higher sentence.

It may be this express admission that prompted the judge to submit to the jury the entrapment claim,

an obligation that exists only where there is record evidence that "fairly supports" the claim. *United States v. Rodriguez*, 858 F.2d 809, 812-14 (1st Cir. 1988). Whether this is such a case may be debated—there is no rule that the agent must stop with the first crime—but it is hard to fault the trial judge for avoiding the risk that an appellate court might say later that the issue should have been left to the jury.

Under the precedents, once the defendant makes a preliminary showing, the burden shifts to the government to prove beyond a reasonable doubt one of two things, *either* of which defeats the defense: that the government did not wrongfully induce the accused to engage in criminal conduct *or* that the accused had a predisposition to engage in such conduct absent the inducement. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *Rodriguez*, 858 F.2d at 812, 814-15. Given the burden-shifting, the term "defense" may be thought to understate the government's full burden.

However, in practical terms the defense is difficult for the defendant because the threshold that must be met to show *wrongful* inducement is a high one. By their nature, "stings" and other such long-permitted operations of law enforcement do "induce" crimes, if that word is used in its lay sense. But it is settled that only *undue* pressure or encouragement are forbidden. *United States v. Rogers*, 102 F.3d 641, 645 (1st Cir. 1996); *United States v. Acosta*, 67 F.3d 334, 337-38 (1st Cir. 1995). The reasons, *see generally United States v. Gendron*, 18 F.3d 955, 961-62 (1st Cir. 1994) (Breyer, C.J.), are too familiar to require repetition.

In this instance, the jury could easily reject the entrapment defense for lack of impropriety, because

of propensity or both. If the CI were credited, DePierre's initial call *was* a proposal to sell crack; DePierre made clear that he could cook the powder into crack if desired; and although the CI made multiple phone calls to DePierre to set-up the two drug sales, no evidence indicates that the agents or the CI applied any undue pressure to secure the crack or even had to overcome resistance. The government's desire to establish the more serious crime may offend the fastidious, but inviting crime is the essence of sting operations. *Cf. United States v. Terry*, 240 F.3d 65, 66-70 (1st Cir. 2001); *United States v. Egemonye*, 62 F.3d 425, 427-28 (1st Cir. 1995).

Still, DePierre was entitled to have any instruction given be a proper one. He did not object to the original instruction nor to a summary definition thereafter given at the jury's request; but when the jury then asked for more guidance, the judge provided a written summary of the inducement and predisposition criteria. DePierre objected to the written summary's use of the word "improperly" to qualify the character of the government conduct required. The judge's summary said that the government must prove:

> *One*, that the cooperating informant did not improperly persuade or talk the defendant into committing the crime. Simply giving someone an opportunity to commit a crime is not the same as improperly persuading him, but excessive pressure by the cooperating informant can be improper; OR
>
> *Two*[,] that the defendant was ready and willing to commit the crime without any improper persuasion from the cooperating individual.

Courts have had difficulty tailoring a useful abstract definition of what is wrongful inducement—this is equally true of "reasonable doubt," *see United States v. Whiting*, 28 F.3d 1296, 1303-04 (1st Cir. 1994)—and have regularly resorted both to examples and to adjectives to illuminate the concept. In the original instruction in this case, to which no objection was taken, the district judge said, among other things, that entrapment requires "some form of excessive pressure or some form of undue sympathy," and the court gave examples of permissible conduct to illustrate the difference between what was and was not entrapment.

There was nothing wrong in using the term "improper," and a number of our own decisions have done so. Thus, in *Santiago*, we said that the "inducement" prong requires "a degree of pressure or . . . other tactics that are improper." 566 F.3d at 58; *accord Acosta*, 67 F.3d at 337. Apart from attacking the word "improper," DePierre merely complains that the summary did not include examples. But the court earlier had given examples, and taking the charge on entrapment as a whole—the usual test, *United States v. Taylor*, 54 F.3d 967, 976 (1st Cir. 1995)—it fairly explained the concept to the jury.

This brings us to DePierre's related claim of sentencing factor manipulation, which occurs when the government "improperly enlarge[s] the scope or scale of [a] crime" to secure a longer sentence than would otherwise obtain. *United States v. Vasco*, 564 F.3d 12, 24 (1st Cir. 2009) (quoting *United States v. Fontes*, 415 F.3d 174, 180 (1st Cir. 2005) (alterations in original)); *accord United States v. Montoya*, 62 F.3d 1, 3-4, (1st Cir. 1995). This claim and the entrapment defense have evident similarities; the

claims may closely overlap in a single case (as they do here), and, confusingly, the term "entrapment" is sometimes used in describing the manipulation claim. *See United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992) (noting the nomenclature problem).[2]

But the entrapment defense in federal courts dates back to the 1930s, *see Sorrells v. United States*, 287 U.S. 435 (1932); 2 LaFave, *Substantive Criminal Law* § 9.8(a), at 88-89 (2d ed. 2003), creates a jury issue and can result in an acquittal, *see Acosta*, 67 F.3d at 337-38. Sentencing factor manipulation is a more recent concept in this circuit (and some others) by which the judge, not the jury, can adjust a sentence downward if the judge concludes that the government has improperly enlarged the scope or scale of the crime to secure a higher sentence. *See Montoya*, 62 F.3d at 3-4; *Connell*, 960 F.2d at 194-97. The defendant bears the burden of making such a showing. *Jaca-Nazario*, 521 F.3d at 57.

For sentencing factor manipulation, impropriety is the main focus, although predisposition is sometimes described as negating the claim, *Jaca-Nazario*, 521 F.3d at 58-59; *United States v. Gibbens*, 25 F.3d 28, 31 & n.3 (1st Cir. 1994), and in this circuit the threshold is very high, *e.g.*, *United States v. Richard-*

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[2] Adding to the confusion, this circuit uses the phrases "sentencing factor manipulation" and "sentencing entrapment" interchangeably, *United States* v. *Jaca-Nazario*, 521 F.3d 50, 57 (1st Cir. 2008), but other circuits vary, *e.g.*, *United States* v. *Garcia*, 79 F.3d 74, 75 (7th Cir. 1996) (distinguishing between government inducement of a more serious crime and conduct merely increasing the defendant's sentence); *United States* v. *Jones*, 18 F.3d 1145, 1152-53 (4th Cir. 1994) (sentencing entrapment implicates defendant's predisposition but manipulation does not).

son, 515 F.3d 74, 86 n.8 (1st Cir. 2008) (requiring "an extreme and unusual case" such as "'outrageous and intolerable pressure' or 'illegitimate motive on the part of the agents'" (quoting *Montoya*, 62 F.3d at 4)); *Jaca-Nazario*, 521 F.3d at 58 (requiring "extraordinary misconduct").

This comparatively high threshold owed something to concerns about undermining detailed statutory and guideline provisions designed to control variations in sentencing and, conversely, perhaps to a perception that ordinary entrapment doctrine has a close relationship to drawing the line between guilt and innocence, where courts are especially protective. *Montoya*, 62 F.3d at 4; 2 LaFave, *supra* § 9.8(b), at 95 n.48 (discussing circuit case law). Under our precedents, the adjectives are part of the doctrine.

In all events, there was no wrongful manipulation here under any phrasing of the standard. This is patent if the trial judge believed the CI's statement that DePierre himself offered crack in the first conversation; but in any case, the evidence already discussed shows that the CI exerted no real pressure, let alone undue pressure, to secure the sale of crack, which DePierre showed no hesitation in providing. We add that manipulation decisions by the sentencing judge are reviewed with deference, *Jaca-Nazario*, 521 F.3d at 57, but given the evidence, no deference is needed to sustain the decision here.

This brings us to DePierre's main claim. The drug statute requires that to generate the mandatory minimum ten-year sentence, the sale or sales comprise 50 grams or more of "cocaine base." 21 U.S.C. § 841(b)(1)(A)(iii). The jury was instructed to determine the nature and amount of the drug sold because these facts raise the statutory *maximum* for drug

distribution and trigger the requirements of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). DePierre's contention, which was preserved in the district court, is that the statute should be read to apply only to that form of cocaine base called crack, a position that some circuits have accepted.[3]

The statutory offense is defined as the sale (or other defined acts) of any amount of any drug comprising "a controlled substance," 21 U.S.C. § 841(a), and the distinctions as to the type of controlled substance and the amount are primarily a concern of the statutory provisions defining "[p]enalties," *id.* § 841(b); *United States v. Goodine*, 326 F.3d 26, 31-32 (1st Cir. 2003). Because the sale of any form of cocaine in any amount permits a maximum sentence of 20 years, 21 U.S.C. § 841(b)(1)(C), DePierre's sentence would not have been an *Apprendi* violation regardless of whether the drug was crack or some other form of cocaine. *United States v. Lizardo*, 445 F.3d 73, 89-90 (1st Cir. 2006).

However, the character of the drug could affect the judge's choice of sentences and, if the judge had wrongly classified the drug here at issue as one for which Congress had aimed at higher sentences, there might still be an error prejudicial to the defendant. But the instruction given by the judge accords with how this circuit has read the statutory term "cocaine

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[3] Circuits limiting "cocaine base" to only crack (or to crack and other types of smokable cocaine base) include *United States v. Higgins*, 557 F.3d 381, 394-96 (6th Cir. 2009); *United States v. Edwards*, 397 F.3d 570, 575-77 (7th Cir. 2005); *United States v. Vesey*, 330 F.3d 1070, 1073 (8th Cir. 2003); *United States* v. *Hollis*, 490 F.3d 1149, 1155-57 (9th Cir. 2007); *United States* v. *Munoz-Realpe*, 21 F.3d 375, 377-78 (11th Cir. 1994); and *United States* v. *Brisbane*, 367 F.3d 910, 912-14 (D.C.Cir. 2004).

base," so there was no error in the instruction or in the verdict confirming that the drug was cocaine base within the meaning of the statute.

Given the background supplied by *United States v. Robinson*, 144 F.3d 104, 108 (1st Cir. 1998), it is enough to say here that the rock-like substance known as crack is the most familiar form of cocaine base, while powder cocaine is not cocaine base but rather is a salt, most commonly cocaine hydrochloride. *Id.* Although chemically similar (crack is made by cooking the powder form), Congress deemed crack far more dangerous in its effects on users and prescribed higher mandatory minimum and maximum sentences for sale of cocaine base than for other forms of cocaine. *United States v. Manzueta*, 167 F.3d 92, 94 (1st Cir. 1999).

DePierre, like others before him, argues that the statute although referring explicitly to "cocaine base" should be judicially restricted to only the specific form of cocaine base known as crack, which (admittedly) was the main focus of Congress's concern. As it happens, some evidence indicates the substance here was crack and at sentencing the judge repeatedly referred to it as crack; but to rely on that would needlessly raise an evidentiary issue that DePierre contests and also raise doubts about the continued vitality of binding circuit precedent as to the meaning of the statute.

This circuit (along with a number of others) has read the statute according to its terms and held that "cocaine base" refers to "all forms of cocaine base, including but not limited to crack cocaine." *United States v. Anderson*, 452 F.3d 66, 86-87 (1st Cir.

2006).[4] Thus, the district court's instructions and the jury verdict accorded with our precedent, and the mandatory minimum sentence was properly imposed. This panel cannot overrule settled circuit precedent absent supervening authority or some other singular event. *Anderson*, 452 F.3d at 86.

DePierre says that *Kimbrough v. United States*, 552 U.S. 85 (2007), discussing the disparity between powder cocaine and crack sentences, requires us to reconsider our view. But *Kimbrough* was concerned with sentencing guidelines that do use the term "crack," and nothing it said involved a construction of the phrase "cocaine base" that triggers the statutory minimum sentence. *Kimbrough* uses the term "cocaine base" only once, calling "[c]rack cocaine . . . a type of cocaine base." *Id.* at 94.

Kimbrough does also say that the statutory mandatory minimums under 21 U.S.C. § 841 that are at issue here apply to crack, 552 U.S. at 96, and that the statute "criminaliz[es] the manufacture and distribution of crack cocaine," *id.* at 91, but these correct observations do not resolve the question whether the statutory minimums apply only to crack or rather to all forms of cocaine base. Because of the circuit split this issue does need resolution by the

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[4] In this circuit, see *United States v. Medina*, 427 F.3d 88, 92 (1st Cir. 2005); *United States v. Richardson*, 225 F.3d 46, 49 (1st Cir. 2000); and *United States v. Lopez-Gil*, 965 F.2d 1124, 1134-35 (1st Cir. 1992) (opinion on rehearing). For other circuits of the same view, see *United States v. Jackson*, 968 F.2d 158, 162-63 (2d Cir. 1992); *United States v. Barbosa*, 271 F.3d 438, 466-67 (3d Cir. 2001); *United States v. Ramos*, 462 F.3d 329, 333-34 (4th Cir. 2006); *United States v. Butler*, 988 F.2d 537, 542-43 (5th Cir. 1993); and *United States v. Easter*, 981 F.2d 1549, 1558 & n.7 (10th Cir. 1992).

Supreme Court (at least in a case where its resolution matters); but *Kimbrough* does not address the issue, let alone decide it in DePierre's favor.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
versus
FRANTZ DEPIERRE

DOCKET NUMBER 06-CR-10058
UNITED STATES COURTHOUSE
BOSTON, MASSACHUSETTS
APRIL 2, 2008

Excerpt from trial transcript, page 516, line 19 through page 517, line 1:

THE COURT: Okay. Well, I guess where I come out is that the question is cocaine base; that is, the non-hydrochloride form of cocaine, which may or may not manifest itself in something that's been identified as crack cocaine, and, as I recall Rita (phonetic), it was a question of whether it was chunky or plain * * * as a substance.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
versus
FRANTZ DEPIERRE

DOCKET NUMBER 06-CR-10058
UNITED STATES COURTHOUSE
BOSTON, MASSACHUSETTS
AUGUST 8, 2008

Excerpt from transcript of sentencing hearing, pages 39-46

THE COURT: That then leads me to the minimum mandatory. I'm not saying anything that any other judge, I think, would disagree with to say that minimum mandatories are a crude weapon in the war against crime because they don't permit a nuanced response that takes into consideration all of the factors that Section 3553 requires me to consider, but they are the decision that Congress has made because of whatever political considerations in the Congress from time to time to get into the micromanaging of sentencing judgments by judges.

I turn then to the question of the Guidelines, 121 months to 151 months. Those are a series of guidelines a year -- or a month more than the minimum mandatory, and they're reflective of the way in

which the Sentencing Commission itself views this kind of activity. That is, dealing in crack cocaine.

But, of course, I'm in a position to depart from or vary from the Sentencing Guidelines because of the Supreme Court's recent cases, Gall and Kimbrough, to use the classic -- the principal ones, if I think that the Guideline itself doesn't serve the larger purposes of Section 3553.

So, now I turn to Section 3553.

* * * * *

Now, ultimately my responsibility is to fashion that sentence which is sufficient, but involves no more than is necessary to serve all of the issues -- all of the considerations of Section 3553.

I'm satisfied that the minimum mandatory, which is the minimum that I can impose, does that. In fact, left to my own devices, I would go along with the minimum mandatory in this particular case. I cannot. So, the sentence will be 120 months in prison.

* * * * *

I also say, as I must in these circumstances, I think this is far too harsh a sentence for you and if I had my choices, my choices would have been closer to the recommendation that Mr. Masferrer made than it is to that which the government made, but I don't have the choices here. So, under the circumstances, I've given you the lowest sentence in terms of incarceration that I can * * *.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Plaintiff,

v.

FRANTZ DEPIERRE,
Defendant.

CRIMINAL NO. 06-10058-DPW

VERDICT

1. AS TO COUNT ONE

We, the jury, find the Defendant Frantz Depierre Guilty

(Answer "Not Guilty" or "Guilty")

2. AS TO COUNT TWO

A. We, the jury, find the Defendant Frantz Depierre Guilty with respect to the distribution of a controlled substance.

(Answer "Not Guilty" or "Guilty")

If you have answered "Guilty" to Question 2.A., Answer Question 2.B.

B. Was the controlled substance you have found distributed in answer to Question 2.A., cocaine base? Yes

(Answer "NO" or "YES.")

If you have answered "NO" to Question 2.B., return your verdict; if you have answered "YES," answer Question 2.C.

C. Did the defendant Frantz Depierre transfer over 50 grams of cocaine base? Yes

(Answer "NO" or YES.")

If you have answered "YES" to Question 2.C., return your verdict; if you have answered "NO," answer Question 2.D.

D. Did the defendant Frantz Depierre transfer over 5 grams of cocaine base? ___

(Answer "NO" or "YES.")

4/3/08 s/s
DATE FOREPERSON